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Jennie Bryant, respectfully pray that this Court not issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the Judgment and Opinion of the Court of Appeals entered therein on November 24, 1969.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Sixth Circuit, as yet unreported, appears as Appendix J, at pp. 63-79 of the Appendices.

The Opinion of the United States District Court for the Eastern District of Kentucky, which is unreported, appears as Appendix H, at pp. 49-61 of the Appendices.

JURISDICTION.

The jurisdiction of this Court is properly invoked by Petitioners under 28 U.S.C. § 1254(1) and the Petition was filed within ninety (90) days after the Judgment of November 24, 1969, of the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED.

(1) Do historic preservation organizations and individuals who do not own properties listed on the National Register have standing in Federal Courts under either the National Historic Preservation Act of 1966 (PL 89-665, 16 U.S.C. § 470(f)) or the Administrative Procedures Act (5 U.S.C. § 702, or 704) to require the Secretary of Housing and Urban De-

velopment (hereinafter referred to as "HUD") to afford the Advisory Council on Historic Preservation an opportunity to comment on the impending demolition of such properties?

(2) Do individuals who own properties listed on the National Register of Historic Places have standing in Federal Courts under either the National Historic Preservation Act of 1966 or the Administrative Procedures Act to secure judicial review of an administrative decision of HUD which affects such properties?

(3) Does the National Historic Preservation Act of 1966 require HUD to afford the Advisory Council on Historic Preservation an opportunity to comment on the impending demolition of historic structures listed on the National Register of Historic Places when the expenditure of federal funds for the demolition of such structures was approved by HUD prior to such structures being listed on the National Register?

STATUTORY PROVISIONS INVOLVED.

5 U. S. C. § 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * * * * * * *

5 U. S. C. § 702. Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub. L. 89-544, Sept. 6, 1966, 80 Stat. 392.

5 U. S. C. § 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

42 U.S.C. § 1460. Definitions.

The following terms shall have the meanings, respectively, ascribed to them below, and, unless the context clearly indicates otherwise, shall include the plural as well as the singular number:

(a) "Urban renewal area" means a slum area or a blighted, deteriorated, or deteriorating area in the locality involved which the Secretary approves as appropriate for an urban renewal project.

(b) "Urban renewal plan" means a plan, as it exists from time to time, for an urban renewal project, which plan (1) shall conform to the general plan of the locality as a whole and to the workable program referred to in section 1451 of this title and shall be consistent with definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) shall be sufficiently complete to indicate, to the extent required by the Secretary for the making of loans and grants under this subchapter, such land acquisition, historic and architectural preservation, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements.

(c) "Urban renewal project" or "project" may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with

such urban renewal plan. Such undertakings and activities may include—

"(1) acquisition of (i) a slum area or a deteriorated or deteriorating area, or (ii) land which is predominately open and which because of obsolete platting, diversity of ownership, deterioration of structures or site improvements, or otherwise, substantially impairs or arrests the sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominately residential uses, or (iv) air rights in an area consisting principally of land in highways, railway or subway tracks, bridge or tunnel entrances, or other similar facilities which have blighting influence on the surrounding area and over which air rights sites are to be developed for the elimination of such blighting influences and for the provision of housing (and related facilities and uses) designed specifically for, and limited to, families and individuals of low or moderate income, or if the area is found by the local public agency to be unsuitable for use for low or moderate income housing, for use for the development of industrial or educational facilities: *Provided,* That the requirement in subsection (a) of this section that the area be a slum area or a blighted, deteriorated or deteriorating area shall not be applicable in the case of projects under clauses (iii) and (iv) hereof: *Provided further,* That the aggregate amount of capital grants for projects under clause (iv) shall not exceed 5 per centum of the aggregate amount of grants authorized by this subchapter to be contracted for after September 2, 1964;

"(2) demolition and removal of buildings and improvements;

"(3) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out in the urban renewal area the urban renewal objectives of this subchapter in accordance with the urban renewal plan;

"(4) disposition of any property acquired in the urban renewal area (including sale, leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan or as provided in section 1457 of this title;

"(5) carrying out plans for programs of code and enforcement or voluntary repair and rehabilitation of buildings or other improvements in accordance with the urban renewal plan;

"(6) acquisition of any other real property in the urban renewal area where necessary to eliminate unhealthful, unsanitary or unsafe conditions, lessen density, eliminate obsolete or other uses detrimental to the public welfare, or otherwise to remove or prevent the spread of blight or deterioration, to promote historic and architectural preservation, or to provide land for needed public facilities;

"(7) construction of foundations and platforms necessary for the provision on air rights designed specifically for, and limited to, families and individuals of low or moderate income, or construction of foundations and platforms necessary for the provision of air rights sites for the development of industrial or educational facilities;

"(8) acquisition and repair or rehabilitation for resale by the local public agency, of structures which are located in the urban renewal area and which, under the urban renewal plan, are to be repaired or rehabilitated for dwelling use or related facilities;

"(9) relocation within or outside the project area of structures which will be restored and maintained for architectural or historic purposes; and

"(10) restoration of acquired properties of historic or architectural value."

* * * * *

16 U.S.C. § 470. Congressional finding and declaration of Policy.

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts init-

iated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activties. Pub. L. 89-665, § 1, Oct. 15, 1966, 80 Stat. 915.

16 U. S. C. § 470 (f). Effect of Federal Undertakings upon property listed in the National Register; comment by Advisory Council on Historic Preservation.

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470m of this title a reasonable opportunity to comment with regard to such undertaking. Pub. L. 89-665, Title I. § 106, Oct. 15, 1966, 80 Stat. 917.

STATEMENT OF THE CASE.

The Petitioner, South Hill Neighborhood Association, Inc., is a non-profit corporation organized under and existing by virtue of the laws of Kentucky, having as one of its purposes the preservation of buildings. South Hill owns no property whatsoever and is solely an association.

The Petitioner, Curtiss Harrison, owns his home, located a few blocks from the Urban Renewal area, but does not own any property in the eighty (80) acre Urban Renewal area of the City of Lexington and does not own any of the buildings in question.

The Petitioners, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, own properties in the Urban Renewal area and which are two (2) of the fourteen (14) buildings in question.

The Respondent, Urban Renewal, is a municipal corporation, organized under and existing by virtue of the laws of the Commonwealth of Kentucky, having all of the powers set forth in *Kentucky Revised Statutes* 99.330, *et seq.*

The Urban Renewal Agency of Lexington was properly formed by the City of Lexington, Kentucky in 1959, and in 1965, an Urban Renewal Plan was adopted by the Agency for an eighty (80) acre area in the heart of downtown Lexington. The Agency, on August 4, 1965, as required by law, held a public hearing on the Plan after publishing notices and mailing notices to the last known owner of each parcel of land in the project area. Notices were sent to the Peti-

tioner, Mrs. Stathis Kafoglis, and to the predecessors in title of the Petitioners, Mr. and Mrs. W. T. Dennis.

The 1965 Plan was subsequently approved by HUD and a Loan and Capital Grant Contract entered into between HUD and Urban Renewal on June 7, 1966. The 1965 Plan provided that all land in the project area would be used for commercial purposes and that all land to be acquired by the Agency *would be cleared of all improvements. The Loan and Capital Grant Contract approved the spending of federal funds for such purposes.* All of the fourteen (14) buildings which are the subject matter of this action were to be acquired and demolished by the Agency under the 1965 Plan.

In July of 1968, the Urban Renewal Plan was amended by the Agency. The Agency held a public hearing on the amended Plan after publishing notices and mailing notices to the last known owner of each parcel of land in the project area, including the Petitioners, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis.

The purpose of the 1968 amendment to the 1965 Plan was to provide for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets, and to provide for an alternate use for historic preservation in the north half of the 200 block of West High Street. Seven (7) of the buildings involved in this action were located on the north side of West High Street in the 200 block at the extreme northerly edge of the Urban Renewal area.

As a pre-requisite to historic preservation, the 1968 amended Plan provided that: (a) the seven (7) buildings, if allowed to remain, would be brought up to rehabilitation standards; (b) an acceptable plan, including financial, physical restoration and a time schedule, be presented to the Agency by a *bona fide* histric preservation organization obligating the owners to do the original restoration, continue the maintenance of the buildings, and acquire the buildings at fair market value, and (c) should the buildings not be restored, *they would be demolished* and the land redeveloped in commercial uses.

At the public hearing of July, 1968, the alternate use for historic preservation and the conditions therefor were explained to persons in attendance who were interested in historic preservation.

The 1968 amended Plan was subsequently approved by HUD *and the spending of federal funds for demolition of the buildings approved.*

In January of 1969, the Urban Renewal Plan was again amended by the Agency. The Agency held a public hearing on this amended Plan after publishing notices and mailing notices to the last known owner of each parcel of land in the project area, including the Petitioners, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis. The purpose of the second amendment was to provide for changes in the alignment of certain streets, however, this second amendment retained the alternate use for historic preservation for the seven (7) buildings in the 200 block of West High Street under the same conditions outlined in the 1968 amended

Plan. This 1969 amended Plan was approved by HUD on May 9, 1969, *and the spending of federal funds for demolition of the buildings approved.*[1]

Between July, 1968, and January, 1969, none of the Petitioners nor any historical preservation groups submitted any plan to the Agency whereby the buildings would be rehabilitated, maintained and acquired at their fair market value.

In April and May of 1969, the Agency, by public advertisement and other notices, invited public proposals for the reuse of a tract of the Urban Renewal property. The public advertisements inviting proposals stated that competition was to be based on proposed development and judged on a point system. The public advertisements also stated that:

> "Historic restoration is a permitted use for those properties fronting on High Street between Mill and Upper Street . . . . (the 200 block)
>
> * * * * * * *
>
> "All proposals for development of the property must be in accordance with the Urban Renewal Plan for Project Ky. R-63 and . . . must contain:
>
> 1. Offer to Purchase.
> 2. Redevelopers Statement of Qualifications and Financial Responsibility.
>
> * * * * * * *
>
> 7. An estimate of number of persons to be employed by building occupants.

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[1]This approval by HUD was two (2) months prior to the date that the buildings were listed on the National Register of Historic Places.

8. Good faith deposit of 10 percent of offered price in the form of a certified check or equivalent."

* * * * * * *

On July 10, 1969, the same day set for the opening of reuse proposals, the fourteen (14) buildings were placed on the National Register of Historical Places as the "West High Street Historic District."[2]

On July 10, 1969, two (2) proposals for the reuse of the land had been submitted to the Agency, one by the Respondent Bank, the second by Historic Lexington, Incorporated. The proposal by the Bank was for a multi-story bank and office building to cost between $4,000,000.00 and $8,000,000.00, to employ One Thousand (1,000) persons, was accompanied by the required good faith deposit of Ten (10%) percent of the advertised price and otherwise complied with the Invitation for Proposals and Instructions to Bidders.

The proposal by Historic Lexington, Incorporated, one of the class which Petitioners purport to represent in this action, was not signed as required by the Instructions to Bidders, was not accompanied by the required good faith deposit and did not otherwise comply with the Invitations for Proposals and In-

[2]The integrity of the procedural steps taken by Petitioners to have the buildings listed on the National Register has been questioned by the Respondents in their Answer to the Complaint. The Respondents have avered that such listing was illegal because the procedural steps taken did not comply with Section 2.9 of "Grants For Historic Preservation, A Guide for State Participation," United States Department of the Interior, National Park Service, Office of Archaeology & Historic Preservation, January, 1969. (See Appendix K, pp. 80 to 102, of the Appendices and Appendix L, pp. 103 to 110 of the Appendices.)

structions to Bidders. The Agency notified Historic Lexington of the deficiencies in its proposal and gave them an opportunity to correct such deficiencies. As of the date of the filing of this action in the District Court, October 17, 1969, such deficiencies had not been corrected.

On *August 5, 1969,* official notice of the listing of the "West High Street Historic District" on the National Register was carried in 34 *Federal Register,* # 148, page 12723.

On September 3, 1969, the proposal of the Respondent Bank was accepted by the Agency, a Contract between the Bank and the Agency entered into, and on October 1, 1969, the Agency tendered deed to the Bank. The Contract between the Bank and the Agency required the land to be cleared of all improvements.

The Complaint of Petitioners was filed in the District Court on October 17, 1969. With the Complaint was filed a Motion for Temporary Restraining Order and the Affidavit of the Petitioner, Curtiss Harrison. The Motion for Temporary Restraining Order sought to restrain the Respondents from demolishing fourteen (14) buildings located on the north side of West High Street in Lexington, Kentucky. The District Court refused to enter the Restraining Order sought by the Petitioners on the ground that the Respondents had previously been restrained from demolishing the fourteen (14) buildings by the Fayette Circuit Court by an Order entered therein on October 16, 1969.

The action then pending in the Fayette Circuit Court had been filed on October 16, 1969, and the Re-

straining Order issued on October 16, 1969. In the State Court action the Respondents filed Motions to Dismiss on various grounds and on October 21, 1969, the State Court, after hearing the various Motions then pending, dismissed the action for failure to state a claim.

On October 21, 1969, the State Court entered an Order staying entry of the Judgment dismissing the State Court action until 5:00 P.M., October 22, 1969. On October 22, the Petitioners filed a Motion in the Kentucky Court of Appeals for Interlocutory Injunctive relief during the pendency of the appeal, and on the same day, the Kentucky Court of Appeals, sitting *en banc*, overruled Petitioners' Motion for Interlocutory Relief during the pendency of the appeal.

The District Court, after being informed by Counsel for Petitioners in the morning of October 22, that the Kentucky Court of Appeals would probably deny injunctive relief, set Petitioners' Motion for Temporary Restraining Order to be heard in Covington, Kentucky, at 4:30 P.M. on October 22. After hearing arguments of counsel, the District Court entered its Temporary Restraining Order.

On October 31, the District Court heard statements of counsel and evidence offered by the Petitioners, was of the opinion that there was no dispute as to the facts, ordered the case submitted on the record, and ordered the parties to file with the Court their requested Findings of Fact and Conclusions of Law.

On November 6, all Respondents, except HUD, filed their Answer. HUD chose to rely on its Motion to Dismiss.

As principal grounds for the District Court action, the Petitioners alleged that:

(1) The Respondents, Urban Renewal and HUD, did not comply with the provisions of § 106 of the National Historic Preservation Act of 1966, in that HUD failed to afford the National Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the impending demolition of the buildings; and

(2) The Petitioners' rights to due process were violated since decisions were made about demolition of the buildings without notice to the Petitioners and without giving Petitioners a reasonable opportunity to be heard.

On November 10, 1969, the Petitioners and Respondents filed their proposed Findings of Fact and Conclusions of Law with the District Court. On November 14, the District Court entered its Order: (a) dissolving the Temporary Restraining Order, (b) overruling Petitioners' Motion for Temporary Injunction, and (c) sustaining Respondents' Motion to dismiss the Complaint. The grounds upon which the District Court ruled were:

> "The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U.S.C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under

28 U.S.C. 1361 and subject to an injunction under 28 U.S.C. 1951. The plaintiffs further contend that the action of HUD would be reviewable under the administrative Procedures Act, 5 U.S.C. 701, *et seq.*

"Defendants deny these allegations and move the Court to dismiss the complaint for the reason that plaintiffs lack standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

"It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in *Flast* v. *Cohen,* 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attached nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. *Supra* at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers." (See Appendix H, pp. 49-61 of the Appendices.)

The District Court further ruled that even if the Petitioners had standing to invoke the jurisdiction of the Court, dismissal of the Complaint would be in order, and said:

"It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

"If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington Urban Renewal Plan, Ky.

R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a 'Loan and Capital Grant Contract' was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for Historic Places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

"Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and bids for the property in question. These bids were to be submitted July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U.S.C. 470f is without merit. 16 U.S.C. 470f and the duty contained therein refers only to times

when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in *Kent County Council for Historic Preservation* v. *George R. Romney,* Civil Action No. 6174 (W.D. Mich. October 2, 1969). Even if plaintiffs did have standing approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U.S.C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

"The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties." (See Appendix H, pp. 49-61 of the Appendices.)

It is from this Order of the District Court that Petitioners, on November 17, 1969, appealed to the United States Court of Appeals for the Sixth Circuit. On November 24, 1969, the Court of Appeals, after both Petitioners and Respondents had filed briefs, sustained the Judgment of the District Court. It is from this Judgment that Petitioners seek the writ.

REASONS WHY WRIT SHOULD NOT BE GRANTED.

1. The Court of Appeals and District Court Properly Held That the Petitioners Have no Standing.

In 1966, Congress enacted the National Historic Preservation Act of 1966 (Pub. L. 89-665, 80 Stat. 915, 16 U.S.C. 470, *et seq.*). Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical and cultural foundations of the Nation should be preserved. . . ." (16 U.S.C. 470(a) and (b)). To implement this policy Congress provided in Section 106 of the Act that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the *approval of the expenditure of any Federal funds* on the undertaking . . . take into account the effect of the undertaking on any . . . building included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to the undertaking." (Emphasis supplied.)

Also, in 1966, Congress amended the National Housing Act of 1949, 42 U.S.C. 1460(b) and (c) to provide:

> "(b) 'Urban rewenal plan,' means a plan, as it exists from time to time . . . which plan . . .
>
> (c) (2) shall be sufficiently complete . . . *to indicate to the extent required by the Secretary* (of HUD) . . . such land acquisition, historical

> and architectural preservation, demolition . . . *as may be proposed* to be carried out in the urban renewal area. . . .'" (Emphasis supplied.)

To implement the 1966 Amendments to the Housing Act of 1949, the Secretary of HUD, on April 8, 1968, circulated its LPA Letter #452, which provided:

> "No property in the project area that is listed on the National Register shall be . . . demolished . . . without the prior concurrence of HUD. All such actions must be fully justified in *Part I of the Application for Loan and Grant or in subsequent project amendatories as appropriate.*" (Emphasis supplied.)

The Petitioners seek to enforce these statutes and regulations of HUD as "private attorneys general," invoking 28 U.S.C. 1651 (the All Writs Statute) and 28 U.S.C. 1361 (to compel an agency of the United States to perform a duty owed to the Petitioners by mandamus).[3]

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[3]It is interesting to imagine what would happen if a mandamus were issued to require HUD to invite the Advisory Council to comment. To so imagine is, of course, to set up a "straw man," however, HUD would invite the Advisory Council to comment with regard to the demolition. The Advisory Council might say that the buildings should not be demolished. HUD would say, as it has said in its Motion to Dismiss herein, "we have a binding contract with the local agency and have previously approved the demolition of these buildings." HUD would then direct the local Agency to proceed with the demolition. The Advisory Council would be powerless since the 1966 Act has no provisions for enforcement. For a Court to issue a mandamus, would therefore be doing a "useless thing." (See, *Mitchell v. Chambers Construction Co.*, 214 F. 2d 515 (CCA 10th 1954), at p. 517. "Equity will not do a useless or vain thing . . . the Court is fully justified in refraining from entering an empty decree.")

The Petitioners assert standing to bring this action under *Flast* v. *Cohen*, 392 U. S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968); *Powelton Civic Homeowners Ass'n* v. *Department of Housing and Urban Development*, 284 F. Supp. 809 (ED Pa. 1968); *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (CCA 2d, 1968); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (ND Calif. 1968); *Scenic Hudson and Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (CCA 2d, 1965), cert. denied 384 U. S. 941, 86 S. Ct. 1462, 16 L. Ed 2d 540 (1966); *Nashville I-40 Steering Committee* v. *Ellington*, 387 F. 2d 179, cert. denied 390 U. S. 921, 19 L. Ed. 2d 982, 88 S. Ct. 857 (CCA 6th, 1967); *Hardin* v. *Kentucky Utilities*, 390 U. S. 1, 19 L. Ed. 2d 787, 88 S. Ct. 651 (1968); and *El Paso Natural Gas Co.* v. *FPC*, 386 U. S. 129, 17 L. Ed. 2d 814, 87 S. Ct. 932 (1967). These cases are distinguishable from the instant case.

Thus, in *Scenic Hudson*, the Federal Power Commission Act, around which that litigation centered contained a specific provision whereby aggrieved parties could obtain review of commission orders. Section 13(b) of the Federal Power Act, 16 U.S.C. § 825(1)(b) provided:

> "Any *party* to the proceeding under this Chapter *aggrieved* by any Order issued by the Commission in such proceedings may obtain a review of such Order in the United States Court of Appeals for any Circuit wherein the licensee or public utility to which the Order relates is located. . . ." (Emphasis supplied.)

The National Housing Act of 1949, as amended, contains no such provision and makes no mention of judicial review of any administrative action taken thereunder. Further, the Federal Power Commission, in *Scenic Hudson,* was under an affirmative statutory duty to give full consideration to alternative plans submitted to them.

Section 106 of the National Historic Preservation Act, 16 U.S.C. 470(f), requires that the head of any federal agency afford the Advisory Council on Historical Preservation an opportunity to *comment* with regard to its undertaking. The language of this act *places no affirmative duty* upon the Agency to give any consideration to such comments, if forthcoming. Thus, in the final analysis, the ultimate federal expenditure is *completely within the absolute discretion* of the head of the Federal Agency involved, in this case, HUD. Therefore, by the specific language of the Administrative Procedures Act, any acts of HUD in this respect are not reviewable since "committed to Agency discretion by law" (5 U.S.C. 701(a)(2)).

In *Norwalk Core* (395 F. 2d 920 (CCA 2d, 1968)), the District Court had held that the Plaintiffs therein had no standing to sue saying:

> "Neither may the three associations, as party to a class action seek redress on behalf of their members since they are not themselves members of the classes whose rights they claim to be asserting. It is fundamental that in a class action those who claim to represent the class be, themselves, members of the class. . . . Here, the associa-

tions make no claim of being objects of state action, nor did they claim deprivation of any rights in their individual capacities.

"Even if a class action were appropriate, the Plaintiffs have no standing to challenge the official conduct here in question. *Members of the public, whether living inside or outside a project area,* ordinarily have no standing to challenge planning of an Urban Renewal project . . . nor, by alleging civil rights violations, do they gain standing they would otherwise not have. . . . If residents of a project area cannot challenge a project while it is in the planning stages and before construction has begun, certainly they can have no standing to assert the same kind of challenge at a time when planning has been implemented, most of the land has been purchased and conveyed to the developers, and construction of new buildings has been almost completed." (*Norwalk Core, et al.* v. *Norwalk Redevelopment Agency, et al.*, 42 F.R.D. 617, at p. 622 (DC Conn. 1967).) (Emphasis supplied.)

The Circuit Court for the second circuit reversed the District Court on the grounds that the Complaint did state a cause of action for violation of the equal protection clause of the Fourteenth Amendment. The Complaint alleged that in planning and implementation of the Urban Renewal Project, the local Defendants did not assure or attempt to assure relocation for Negro and Puerto Rican displacees to the same extent that they did for whites. The Circuit Court did, however, affirm the District Court holding that to have

standing to sue, one must have a *personal stake* in the outcome of the litigation. The Court said:

> ". . . It is true that courts have been reluctant to interfere with Urban Renewal planning. The fact that the reasons for this reluctance have been lumped together under the rubric of 'lack of standing to sue' should not be allowed to obscure the distinction, necessarily albeit not altogether clear, between the propriety of allowing particular plaintiffs to bring litigation (there standing to sue) and the priority of judicial attempts to resolve the problems which the Plaintiffs are attempting to bring before the Court (the question of justiciability).
>
> "We consider first the issue of standing. The Court *will not, it is clear, entertain a suit by one who does not have some personal stake in the outcome of the litigation. . . .*
>
> "Even where a Plaintiff has a personal stake in the outcome of a case, he may be denied standing to sue on the ground that the right which he is attempting to assert is not one which the Courts will recognize. Thus, one cannot as a general matter object to governmental action on the basis that it aids ones competitors, for it is said that no legal wrong results from lawful competition. . . . This Court has, accordingly, refused to grant standing to Plaintiffs who object to urban renewal planning on this basis. *Taft Hotel Corporation* v. *H.H.F.A.*, 262 F. 2d 307; *Berry* v. *H.H.F.A.*, 340 F. 2d 939. . . .
>
> "The Plaintiffs in the case before us are in a very different position. *Their stake in the outcome of the case is immediate and personal,* and the

right which they allege has been violated—the right not to be subjected to racial discrimination in government programs—is one which the Courts will protect. Their standing to sue is clear. . . . (Emphasis supplied), (395 F. 2d 920, at p. 926, 927)."

In *Western Addition,* the action was brought on behalf of residents about to be displaced from their homes by construction of an urban renewal project. The Court, in giving Plaintiff standing to sue, cited *Powelton,* and said:

"In *Powelton Civic Home Owners Ass'n* v. *Department of Housing and Urban Development,* 284 F. Supp. 809 (E. D. Pa. 1968) the Civic Association and residents of an urban renewal area brought an action against the Secretary to enjoin disbursal of federal funds to the local redevelopment agency on the ground of absence of adequate relocation. The Court recognized the judicial reviewability of the Secretary's procedures under the Housing Act and also the standing of displaced residents to sue. On the subject of standing (pp. 820-828) the Court upon a review of the cases (including *Johnson,* supra), succinctly states its conclusion:

"'*The Plaintiff's economic interest in adequate relocation is obvious and beyond dispute.* The provisions of the Housing Act recognize and seek to protect that interest. The Secretary of HUD has allegedly acted in disregard of the plaintiff's recognized and protected interest. 'When a party seeks judicial relief from an injury inflicted by administrative action upon an

> interest recognized by statute, standing and review traditionally obtain.' * * * The Plaintiffs' theory of relief fits the traditional formula. Particularly where, as here, the gravamen of the plaintiffs' complaint is that the Secretary has failed to provide implicitly required procedural machinery, the court should not abandon its institutional responsibility for assuring the procedural due process of agency actions. In the absence of an explicit congressional mandate, we believe it inappropriate to abdicate that responsibility in this case * * * We have concluded that the relocation provisions of 42 U.S.C. § 1455 (c) (1) and (2), both in their substantive and in their procedural implications, are intended for the protection of these particular plaintiffs and do provide standing in this case' (Emphasis supplied), (294 F. Supp. 433, at p. 444)."

The case most nearly in point is *Harrison-Halstead*, where an Injunction was sought to prevent governmental agencies from proceeding with a plan to acquire and clear an area for use as a university campus. The Plaintiffs, following the adoption of the Urban Renewal Plan and in reliance thereon, relocated in adjacent areas with expectations of returning after redevelopment. As it turned out the redevelopment plan provided for clearance of the land to construct a university campus. The Court, in holding that the Plaintiffs had no standing to sue, said:

> "Nevertheless, and in spite of the outraged feelings of many people who have interests in this

area, we have in mind that *questions arising from the taking of property by condemnation for state purposes, are ordinarily matters for determination by the state courts.* The plaintiffs in this case have sought relief in a Federal Court. Whether they may properly do so depends principally on whether they have a standing to sue and whether a substantial federal question is involved.

"We think it is well settled that in a private suit in a federal court, where it is claimed that a substantial federal question is involved it must clearly appear that defendant's acts constituted the invasion of *plaintiffs' private legal rights. Frothingham* v. *Mellon,* 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078. In the Frothingham case a taxpayer brought a suit to enjoin expenditure of federal funds under a federal subsidy statute. The court said, page 488, . . . 'the party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'

* * * * *

"When a subsidy application is approved by the Administrator of HHFA, contracts are entered into by the agency and the local governmental body, here the Chicago Land Clearance Commission. Congress did provide certain standards to guide the Administrator in the exercise of his discretion. But, *such provisions and regulations thereunder do not confer legal rights upon plain-*

tiffs, as individuals, separate from their position as members of the general public.

* * * * *

"Plaintiffs argue that although the Housing Act says nothing about a judical review, Section 10 of the Administrative Procedures Act (5 U.S.C. § 1009), does so provide.

* * * * *

"We hold the plaintiffs herein do not have a right of judicial review of the agency action herein, pursuant to section 10 of the Administrative Procedures Act. (Emphasis supplied), (310 F. 2d 99, at p. 104, 105)."

Thus, it is respectfully concluded that the Petitioners herein have no standing to challenge the official conduct here in question. The standing of the Pettitioners is not elevated by the addition of Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, who own two of the buildings in question within the Urban Renewal area of Lexington, since *neither Mrs. Kafoglis nor Mr. & Mrs. Dennis actually reside in the buildings.* Both buildings are now and have been for many years used as low rent "boarding" and "flop" houses.

As stated in *Norwalk Core:*

". . . Members of the public, whether living inside or outside a project area, ordinarily have no standing to challenge planning of an urban renewal project, . . . (42 F.R.D. 617 at p. 622)."

Further, even if there are irregularities in the adoption of the Urban Renewal Plan or in the conduct of

certain Agency members as is alleged in Petitioners' Complaint, such questions should be and have been raised in State Courts.[4]

As was said in *Harrison-Halstead:*

> "Nevertheless, and in spite of the outraged feelings of many people who have interests in this area, we have in mind that questions arising from the taking of property by condemnation for state purposes, are ordinarily matters for determination by the state courts. . . . (310 F.2d 99 at p. 103)"

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[4]The Complaint as amended alleges that "some members of the Agency . . . had . . . private financial interests in property located in the urban development area under K.R.S. 99.-350(7) . . . ." K.R.S. 99.350(7) prohibits any member of the agency from acquiring any property in the urban renewal area. It further provides, that if any agency member has a direct or indirect interest in any property in the urban renewal area, "he shall immediately disclose" such interest in writing. Failure to so disclose constitutes "misconduct in office." However, under K.R.S. 99.350(6) the sole penalty for misconduct in office is to make the Agency member subject to removal from office after a public hearing. Misconduct in office does not have the effect of altering or voiding the Urban Renewal Plan. (See Opinion of Fayette Circuit Court, December 24, 1969, pp. A-10 of Petitioners' Petition.)

The Complaint as amended further alleges that informal, special and regular meetings of the Agency were held without notice to the Petitioners. The Respondents are not aware of any requirements of law that any notices of any meetings of the Agency be given to members of the public except those meetings at which the Urban Renewal Plans were approved. These public meetings were properly noticed by newspaper advertisements and by mailed notices as required by K.R.S. 99.370(3). The notices of these meetings and the proceedings thereat complied with all due process requirements. (See, *Green Street Association* v. *Daley*, *infra*, wherein it was alleged that Plaintiffs were limited to reading a prepared statement, they were harassed and intimidated, denied the opportunity to cross-examine, and that the committee's conclusions were dictated in advance by the Defendants and persons unknown. The Court held, "no substantial federal question of due process is raised.")

Furthermore, no jurisdictional comfort is found for Petitioners under 5 U.S.C. § 702, § 703, or § 704 (the Administrative Procedures Act).

In *Green Street Association,* an action was filed by the Green Street Association, and 125 individual negro plaintiffs seeking a judicial review of an Urban Renewal Project in the area. The Court, in denying jurisdiction of the District Court, said:

> "Count II names both the local and the federal defendants. It alleges that at the public hearing on the Central Englewood Project, conducted by a committee of the Chicago City Council, the plaintiffs were limited to reading a prepared statement, that they were harassed and intimidated, and that they were denied the opportunity to cross-examine the defendants and the witnesses supporting the Project. Count II also alleges that the public notice required for the hearing was defective and that the committee's conclusions were dictated in advance by certain defendants or persons unknown. For these reasons it is asserted that the hearing did not conform to the requirements of section 105 (d) of the Housing Act of 1949, 42 U.S.C. § 1455 (d), and denied the plaintiffs due process. The plaintiffs seek to enjoin all defendants from proceeding to carry out the Project until a "full and fair public hearing on it has been held in compliance with law. * * *" For jurisdictional purposes, they rely on 28 U.S.C. § 1331 and section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.
>
> "In Harrison-Halstead Community Group, Inc. v. Housing & Home Fin. Agency, supra, sim-

ilar claims of the inadequacy of a hearing were made, supported by the same jurisdictional allegations. As has already been stated, we held there that neither section 105 (d) of the Housing Act nor section 10 of the Administrative Procedure Act provides the basis for a federal right to judicial review of an urban renewal plan. We see no reason to reexamine our position in that case. Moreover, no substantial federal question of due process is raised. Rindge Co. v. Los Angeles County, 262 U. S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); Combs v. Illinois State Toll Highway Comm., 128 F. Supp. 305 (N.D. Ill. 1955). The district court properly dismissed Count II (373 F. 2d 1, at p. 7)."

In *South Suburban Safeway Lines,* the Plaintiff, who operated an intra state transit service, sought an Injunction to restrain the federal Defendants from granting any further funds to the local Defendants for the construction of a rapid transit system which would compete with the Plaintiff. The Court, in holding that the Plaintiffs had no standing to sue and denying jurisdiction under 5 U.S.C. § 702, said:

"In order for the plaintiff to show that it has standing, it must show that it has suffered, or will suffer in the future a 'direct injury,' i.e., a wrong which indirectly results in the violation of a legal right. Alabama Power Co. v. Ickes, 302 U. S. 464, 479, 58 S. Ct. 300, 82 L. Ed. 374 (1938). This 'legal right' may be a property right, a contractual right, a right protected against tortious invasion, or a right conferred by a statute or constitutional provision. Tennessee Electric Power Co. v. Ten-

nessee Valley Authority, 306 U. S. 118, 137, 59 S. Ct. 366, 83 L. Ed. 543 (1939). The plaintiff here claims that it has a right conferred on it by the Constitution or a statute, and that it has a property right under Illinois law.

"The Urban Mass Transportation Act, however, confers no express right on the plaintiff to sue in this court. In fact, there is no provision for judicial review at all. . . .

"The plaintiff, however, contends that there is an 'implied' right to sue under that Act. Because, the plaintiff argues, the statute mentions the need to co-ordinate private facilities with the overall plan for an urban transit system, this supplies the necessary 'implied' right to sue. *This contention is not well founded.* . . .

* * * * * * *

"Another statute which plaintiff argues gives it standing is Section 10 of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 702. That section provides:

> " 'A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.'

It is conceded, for the purpose of argument, that the plaintiff will be harmed sufficiently to be 'adversely affected or aggrieved by agency action.' There must be, however, a 'legal wrong' or harm which is 'within the meaning of a relevant statute.' Since the Urban Mass Transportation Act does not expressly or impliedly give standing to the plaintiff, the plaintiff must find another 'relevant

statute' which might give them a right to judicial review. Also see Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, supra, 310 F. 2d at 105. The only remaining 'relevant statutes' that could conceivably give the plaintiff standing are the Fifth and Fourteenth Amendments to the Constitution, which form the basis of plaintiff's argument that defendants' actions here violate the protections against deprivation of 'property' without due process of law. *It is clear to this court that the plaintiff must show that it was a victim of some 'legal wrong' or that it was deprived of 'property' without due process, in order to come within the A.P.A. provisions.* But this is the same inquiry that the *Alabama Power* case, supra, requires. It therefore appears to this court that plaintiff's claim to standing rises or falls with the scope of the 'property right' given to the plaintiff as a holder of a certificate of public convenience and necessity.

* * * * * * *

"Since it does not appear that the Plaintiff has the requisite standing, this suit must be dismissed for lack of jurisdiction . . . ." (285 F. Supp. 676, at pp. 678-681). (Emphasis supplied.)

2. Even if the Petitioners Have Standing, the Judgments of the District Court and Court of Appeals are Sustainable on the Merits, Since the National Historic Preservation Act Is Not Applicable Under the Facts.

Section 106 of the Act requires HUD to seek the comments of the National Council "prior to the approval of the expenditure of any federal funds on the undertaking . . . ." The 1965 Urban Renewal Plan of the City of Lexington contemplated the acquisition and demolition of the buildings in question and was approved by HUD prior to July 10, 1969. The 1968 amended Plan likewise contemplated the acquisition and demolition of the buildings in question and was approved by HUD prior to July 10, 1969. The 1969 amended Plan likewise contemplated the acquisition and demolition of the buildings in question and the approval of HUD of that Plan was on May 8, 1969.

Petitioners rely on LPA letter # 452, and Urban Renewal Handbook, RHA 7207.1 (3/27/69) which provide that:

> "No property in the project area that is listed on the National Register shall be . . . demolished . . . without the prior concurrence of HUD."

However, LPA Letter # 452 and RHA 7207.1 further provide:

> "All such actions must be fully justified in Part I of the Application for Loan and Grant or *in subsequent project amendatories as appropriate.*" (Emphasis supplied.)

This language, contemplates local Agency justification of the demolition of buildings listed on the National Register *only if an urban renewal plan is formulated or amended after properties are listed on the National Register.* The buildings in question were listed on July 10, 1969. The Lexington Urban Renewal Plan has not been amended since that date.

3. Even if the Petitioners Have Standing and the National Historic Preservation Act Is Applicable Under the Facts, the Petitioners Have Waived Any Rights They May or Might Have and Are Barred From Enforcing Any Such Rights.

Any rights the Petitioners might have under either the National Historic Preservation Act or the Housing Act of 1949 are barred and have been waived by the Petitioners. That the buildings in question might have some historical significance was taken into consideration by the local agency in its 1968 Urban Renewal Plan and the Plan of 1969. Both provided for an alternate use for historical preservation of the buildings in question. Such use, however, was conditioned upon the groups interested in historical preservation presenting a feasible plan for the restoration, preservation and maintenance of the buildings.

Yet, from June of 1968, to the date hereof, none of the Petitioners nor any of the class which they purport to represent have presented any such plan to the local Agency. On July 10, 1969, a proposal was submitted by Historic Lexington, Incorporated, a member of the class which Petitioners purport to represent, but such

proposal was incomplete and did not comply with the requirements of the Invitation for Proposals or the Instructions to Bidders. Historic Lexington was given an opportunity to correct these deficiencies, but to date has failed. Thus, in reliance upon the failure of the Petitioners and their class to propose a feasible plan for the restoration, maintenance and operation of the buildings in question, the Agency has entered into contracts with various parties for the sale of the land. The Petitioners, after a delay of many months sought to have the state and federal courts set aside contracts of sale and otherwise upset and destroy the Urban Renewal Plan of the City of Lexington.

CONCLUSION.

Thus, it is respectfully concluded that this Court should not issue a Writ of Certiorari to the Court of Appeals, because:

(1) The Petitioners have no standing or capacity to bring the action.

(2) The Respondents have not violated the provisions of Section 106 of the National Historic Preservation Act of 1966, and

(3) The enforcement of any rights that Petitioners may or might have are barred and have been waived.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, J. Montjoy Trimble, Attorney for the Respondents, The City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Fred Fugazzi, Thomas Underwood, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30 day of March, 1970, I served copies of the foregoing Brief of Certain Respondents in Opposition to Petition for a Writ of Certiorari, together with copies of the Appendices to the Brief of Respondents in Opposition to Petition for a Writ of Certiorari on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the Department of Housing and Urban Development, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its General Counsel, at his office, Washington, D. C. 20510.

3. On the Respondent, Citizens Union National Bank & Trust Company, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorneys of record, A. Gene Oliver of Strother, Oliver & Strother, Citizens Union Bank Building, Lexington, Kentucky 40507.

4. On the Respondents, J. Norwood Hodge and Norwood Construction Company, Inc., by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, A. B. Rouse of Fowler, Rouse,

Measle & Bell, 141 North Upper Street, Lexington, Kentucky 40507.

5. On the Petitioners, South Hill Neighborhood Association, Inc., Curtiss Harrison, Mrs. Stathis Kafoglis and Mr. & Mrs. W. T. Dennis, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, Eugene F. Mooney, University of Kentucky, College of Law, Lexington, Kentucky 40506, John E. Kennedy, University of Kentucky, College of Law, Lexington, Kentucky 40506, and Roger B. Sledd, 1404 First National Bank Building, Lexington, Kentucky 40502.

I further certify that all parties required to be served have been served.

J. Marbury Breckinridge

Counsel for Respondents,
The City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Fred Fugazzi, Thomas Underwood, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant.